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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 165

ROLLAND B. MCMASTER, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner, Rolland B. McMaster, respectfully prays that, pursuant to paragraph 2 of Rule 58 of the Revised Rules of this Court, a rehearing be granted of the order of this Court, entered in this case on October 11, 1965, denying the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The reasons for this Petition for Rehearing, hereinafter stated, are confined to substantial and controlling intervening circumstances and grounds not previously presented.

QUESTIONS PRESENTED

1. Should the trial court, in a joint criminal trial, have either excluded from evidence extrajudicial admissions of a co-defendant which, by their nature, necessarily inculpated Petitioner, or, in the alternative, have ordered a separate trial for Petitioner?

2. Was Petitioner deprived of his constitutional right of cross-examination and confrontation when admissions inculpating Petitioner, made by a co-defendant who refused to testify, were admitted in evidence?

3. Was Petitioner deprived of his right to a fair trial when the trial court ordered his counsel not to make reference in any way to his co-defendant's failure to testify after admissions inculpating him, made by a co-defendant who refused to testify, were admitted in evidence?

STATEMENT OF THE CASE

Petitioner was convicted of violations of 29 U.S.C. 186(b) for allegedly receiving payments from his jointly tried and convicted co-defendant, Wolff (Pet. 166, Oct. Term, 1965), the president of an employer of employees represented by Petitioner, a labor union official. The payments were actually made by the employer company to a corporation, Ram Transport, Inc., which the government claimed was in effect Petitioner's alter ego. Petitioner contended, in defense, that by the time the payments were made, he had gifted all his interest in Ram to his then estranged wife—from whom he was later divorced. He disclaimed all knowledge of the payments or the transaction.

Wolff, although declining to take the stand, claimed as a defense that bona fide payments were made to Ram for the rental of a truck (an exception to the proscription of Sec. 186 set forth in 29 U.S.C. 186(c)(3)).

There was evidence that funds of Ram, during the period in question, to some degree were made available to Petitioner, as noted by the Court of Appeals (Pet. 15-16), although his wife had sole authority to draw checks (*Ibid.*, 14).

In 1961, shortly before the indictment, Petitioner's co-defendant Wolff made three statements to F.B.I. Agent Gylfe. In the first statement, he claimed that he and McMaster had an oral contract for him to make payments to Ram for rental of a truck. (App. 104a, 106a). Gylfe stated that Wolff said: "*The terms of this agreement were oral between he and Rolland McMaster . . . president and owner of Ram Transport Company,* (App. 105a, 106a)." In the latter two statements to Gylfe, he repudiated his original claim that he dealt with Petitioner (App. 106a, 111a, 141a), claiming instead that he made the agreement with a Ram official.

These statements were admitted over Petitioner's objection (App. 105a-106a) and the court did not limit this testimony to Wolff until he gave his final charge to the jury (Pet. 20).

The government produced evidence contending that no truck existed as claimed by Wolff. Wolff did not take the stand to refute either the F.B.I. agent's testimony or the nonexistence of the truck.

Prior to final argument, the court ordered that in closing argument no reference be made "that would

in any way indicate the failure of Wolff to take the stand" (App. 1815a-16a, 1845a-46a), and, in his charge, effectively instructed the jury that Wolff conceded making the payments to Petitioner, but that he relied on the exemption created under Sec. 186(c)(3) (App. 2027a). The Sixth Circuit held that the trial court erred in not giving, until its final charge, an instruction to the jury limiting the effect of Wolff's inculpatory admission to Wolff only. It, however, held that in its opinion the error was harmless as it claimed McMaster's guilt had been clearly proved by other evidence (Pet. 20-23).

REASONS FOR GRANTING THE PETITION FOR REHEARING

1. The statement attributed to Wolff was devastating to McMaster as it completely destroyed his defense of lack of connection with Ram and the payments charged in the indictment. Admission of such a statement by a co-defendant implicating, and as evidence against, Petitioner cannot realistically be consigned as harmless error without totally denying Petitioner the right of fair trial by a jury. This court in *Fahy* v. *Connecticut*, 375 U.S. 85, 84 S. Ct. 229 (1963), established the rule that admission of evidence unconstitutionally obtained could never be regarded as harmless error *so long as it may have contributed to the conviction.* The same rationale is true in the instant case unless it could be said that Wolff's extrajudicial statement could not have contributed at all to McMaster's conviction. The rule in *Fahy* should apply equally to federal trials as to state court proceedings.

The rights of defendants in joint trials to be reasonably protected against evidence of admissions of co-

defendants which implicate them has come under increasing scrutiny since this Court decided (5-4) *Delli Paoli* v. *United States,* 352 U.S. 232, 77 S. Ct. 294 (1957). *Intervening since denial of certiorari here,* Chief Justice Traynor (*People* v. *Aranda and Martinez,* 34 LW 2261, Sup. Ct. Cal., Nov. 12, 1965) has enunciated a rule for California requiring either the effective deletion of all reference to the co-defendant from the confession (admission), or the grant of a separate trial for the aggrieved, or, if the state persists in joint trial notwithstanding that the reference to the "non admitting" defendant cannot be effectively exorcised from the statement, the exclusion of the entire statement. Justice Traynor's reasoning is compelling here. If A confesses that he committed criminal acts with B, the jury cannot effectively ignore the inevitable conclusion that B has committed those same criminal acts with A.

Aranda[1] and this Court's decision in *Jackson* v. *Denno,* 378 U.S. 368, 84 S. Ct. 1774 (1964), have raised great speculation that the vitality of *Delli Paoli, supra,* may be sapped.[2] For almost without alteration, the below-quoted language of *Jackson, supra,* (forbidding the submission to a trial jury of the issue of voluntariness of a confession) is equally applicable to an attack on the philosophy of *Delli Paoli:*

> "If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the con-

[1] The Time Magazine article, December 24, 1965, page 31, is reproduced in its entirety as Appendix A hereto.

[2] 78 Harv. L. Rev. 211, 213: "because of the close parallels between *Jackson* and *Delli Paoli, Jackson* may foreshadow a holding that the *Delli Paoli* procedure violates due process."

fession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession?

"It is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict or that its findings of voluntariness, if this is the course it took, was affected by the other evidence showing the confession was true." 378 U.S., at 388, 84 S. Ct. at 1787.

Delli Paoli's philosophic approach had been denounced as sheer sophistry by numerous jurists[3] and a number of states have long adhered to the rule recently adopted by California with signal success.[4]

In the instant case, Petitioner was the more seriously imposed upon, since the statement of Wolff was not merely that he had commited a criminal act with McMaster, but that he had committed an act with McMaster which would only be a crime if committed with McMaster, *a fortiori* if Wolff made an oral contract with McMaster, owner of Ram Transport, Inc., then Petitioner, owner of Ram Transport, Inc., perforce made an oral contract with Wolff.

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[3] *Krulewitch* v. *United States*, 336 U.S. 440, 453, 69 S. Ct. 716, 723 (1949): "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . [is known by] all practicing lawyers to be unmitigated fiction," Jackson, J., concurring with Murphy, Frankfurter, JJ.; *Nash* v. *United States*, 54 F. 2d 1006, 1007, "mental gymnastics," Learned Hand, J.; *U.S.* v. *Delli Paoli*, 229 F. 2d 319, 321 (Hand, J.), 324 (Frank, J., dissenting).

[4] *State* v. *Castelli*, 92 Conn. 58, 101 A. 476; *Peo.* v. *Barbaro*, 395 Ill. 264, 69 N.E. 2d 692; *Peo.* v. *Bolton*, 339 Ill. 225, 171 N.E. 152; *State* v. *Rosen*, 151 Ohio St. 339, 86 N.E. 2d 24.

In short, the compartmentalization required by *Delli Paoli* is virtually impossible. And in numerous other respects *Delli Paoli* is inapposite here, and to the extent that case is still vital, it should be limited so as not to be applicable in situations as this.

In *Delli Paoli,* a closely divided court affirmed a conviction where a statement of one co-defendant was admitted. The majority was of the opinion that under the circumstance of that case the defendant against whom the declaration was admitted, was adequately protected by the court's instructions. The court held that the only issue in that particular case was the adequacy of the instructions. (The dissenting Justices, however, felt that a jury could not be expected to follow instructions of this sort, and that permitting such damaging testimony to be heard by the jury was prejudicial error. In the light of this dissent, it is difficult to perceive how a court can rule, as did the Sixth Circuit here, that an extrajudicial confession by a co-defendant, to the effect that payments for a non-existent piece of equipment were arranged with the owner of a company, could be considered harmless error).

However, in the instant case, it is clear that the factors that impelled the Supreme Court to affirm are clearly lacking. First of all, in *Delli Paoli,* when the declarations were admitted, the Court instructed the jury at great length as to the effect of the declarations. 352 U.S., at pp. 239-240. The substance of this instruction was repeated several times during the trial, *ibid.* Also, a thorough instruction on the subject was included in the court's charge. 352 U.S., at p. 240, fn. 6. On the other hand, in the instant case, no in-

struction whatever was given at the time the evidence was admitted *and in fact it was admitted against both defendants without restriction* (App. 105a-106a, 1815a). The trial court expressed the opinion that, because a joint enterprise in crime is charged, the hearsay rule does not apply (App. 443a). *No limiting instruction was given during the trial.* The court prior to charging the jury stated he would not give such an instruction in his charge even though the government suggested that such an instruction might be in order (App. 1815a-1816a). Because of the court's rulings the government strenuously relied upon the statement attributed to Wolff in its closing argument with respect to McMaster (App. 1888a, 1993a, 1999a, 2001a). Although the court informed counsel he would not instruct on the issue, nevertheless he gave a vaguely worded and confusing instruction:

> "Statements and declarations made by a defendant from which, with other circumstances, an inference of guilt may be drawn, are admissible against him, and him only, as admissions, provided it appears that the said statements were voluntarily made by a defendant." (App. 2030a).

This instruction, objected to by McMaster (App. 2038a), made no reference to the specific evidence involved, i.e., no reference was made to the testimony of the F.B.I. agent. *At no time was the jury instructed that the statement of the agent was inadmissible against McMaster.*

The feckless charge of the court, falling far short of the requirements of *Delli Paoli,* certainly did not carefully compartmentalize the case for the jury, cf. *Schaffer* v. *U. S.,* 362 U.S. 511, 80 S. Ct. 945 (1960); *McElroy* v. *U. S.,* 164 U.S. 76, 17 S. Ct. 31 (1896);

Kotteakos v. *U. S.*, 328 U.S. 750, 66 S. Ct. 1239 (1946). Indeed, the charge to the jury highlighting Wolff's defense (as being grounded in an admission that the payments were indeed made to Petitioner) underscored the prejudice.

This case thus affords this Court a forum to reexamine the current vitality of the highly controversial *Delli Paoli* case. It likewise, should the Court find *Delli Paoli* still vital, affords the Court a forum to delimit and circumscribe the outer limits of that doctrine. It is plainly an area in which an enunciation by the Court should be shortly forthcoming.

2. Recently this Court in *Pointer* v. *Texas,* 380 U.S. 400, 85 S. Ct. 1065 (1965), had occasion to find inviolate a state court defendant's right to confrontation and cross-examination. The Court noted specifically that *Stein* v. *New York,* 346 U.S. 156, 195-196, 73 S. Ct. 1077, 1098-1099 (1953), to the extent that it was in conflict could no longer be regarded as law. In *Stein,* the Court affirmed conviction of a co-defendant implicated by the confession of his co-defendants holding that the right of confrontation was not incorporated in the Fourteenth Amendment.

In the light of *Pointer, supra,* the issue of whether an inculpating statement of a co-defendant who declines to take the stand violates the right of the inculpated defendant to confrontation and cross-examination is raised. This issue is sharpened in the instant case by the adherence of the maker of the statement to a defense grounded on the truth of the statement; and by the trial court's refusal to permit Petitioner's counsel to comment on the maker's failure to testify, and draw reasonable inferences therefrom. Petitioner

was thus effectively prevented from challenging the very evidence which the court admitted into evidence against him.

3. Closely allied to the foregoing contention (and mentioned therein) is the denial of the right to Petitioner's counsel to comment and draw reasonable favorable inferences in closing argument from Wolff's failure to testify.

DeLuna v. *United States,* 308 F. 2d 140, 145 (5th Cir., 1962); *Hayes* v. *United States,* 329 F. 2d 209, 221-222 (8th Cir., 1964). If the trial court ruled correctly in each of these instances, we are faced with a situation which we submit is entirely contrary to fundamental principles of Anglo-American jurisprudence; i.e., McMaster and his counsel were prevented from in any way challenging the damning statements attributed to Wolff, the court would not relieve the situation by an instruction, and the jury was instructed that Wolff paid the money to McMaster, although McMaster's defense is that he received no money from Wolff. The court for all practical purposes thereby directed a verdict of guilty against McMaster.

Of course, had the questions, instructions and comments desired by Petitioner been permitted, defendant Wolff might have been equally justified in complaining. Had Petitioner's instructions and comments relating to the inability to cross-examine Wolff been permitted, Wolff's right against self-incrimination could have been infringed upon. *DeLuna* v. *United States, supra; Hayes* v. *United States, loc. cit., supra.* Furthermore, had the trial court failed to instruct that Wolff was availing himself of the exemption, this clearly would have been prejudicial to Wolff.

Faced with this dilemma, the court in *DeLuna* held that each defendant retained all his inherent constitutional rights regardless of joint trial—and that if the rights of one infringed on those of the other then for each to see the face of justice each defendant must see it separately.

The *DeLuna* doctrine has been much quoted and speculated upon. Since it involves basic constitutional rights which are incorporated in the Fourteenth Amendment, it is a doctrine of a constantly recurring nature in joint trials in both state and federal courts. An evaluation of the doctrine and its applicability is long overdue. By speaking on this issue a gray area in the administration of justice will be settled by the Court.

CONCLUSION

For all the foregoing reasons the Petition for Rehearing should be granted and a writ of certiorari allowed.

Respectfully submitted,

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Certificate of Counsel

Pursuant to the requirements of Rule 58(2) of the Revised Rules of the United States Supreme Court, we, the undersigned, counsel for Petitioner, Rolland B. McMaster, certify that this petition for rehearing is presented to this Court in good faith and not for purposes of delay and is restricted to those grounds specified in said rule.

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APPENDIX A

Article Time Magazine, Dec. 24, 1965 Issue, p. 31

CRIMINAL JUSTICE

Another Confession Problem: Unjoining the Joint Trial

As if the continuing U.S. confession controversy were not complicated enough, now the custom of joint trials has surfaced to compound the confusion. When a crime involves more than one defendant, most prosecutors aim to try them together; indeed, joint trials have occurred in many of the most famous U.S. criminal cases. But what if one defendant's confession implicates another? Is the use of such evidence [illegible] unfair to a man who has not confessed that it must be excluded?

The question arises because of a jewelry-store holdup in Los Angeles, after which the police arrested Henry Martinez and his alleged accomplice, John Aranda. At their joint trial, a policeman testified that Martinez had confessed, implicating Aranda. The judge followed a common practice: he ruled Martinez's confession admissible, but warned the jury not to consider it as evidence against Aranda. Not surprisingly, however, the jury found both men guilty of first-degree robbery.

Acting under its broad new confession doctrine (*People* v. *Dorado*), the California Supreme Court has voided Martinez's confession on the ground that the police failed to warn him of his rights to silence and to counsel as soon as they had other solid evidence against him—his fingerprints at the scene of the crime. In effect, that reversal also destroyed the case against Aranda—and spurred the court to confront the whole problem of how confessions should be handled in joint trials.

Brainwiping. In 1957 the U.S. Supreme Court ruled by a vote of 5 to 4 that federal juries could be trusted to

follow judges' instructions and compartmentalize the evidence against co-defendants, because otherwise "the jury system does not make sense." But in that decision (*Delli Paoli* v. *U.S.*), the four dissenters argued, in the words of Justice Felix Frankfurter, that whatever is said in joint trials "cannot be wiped from the brains of the jurors." And this year the court seemed to lean toward the Frankfurter attitude as it struck down a similar kind of mental gymnastics: the old custom of asking the same jury to determine both the validity of a confession and the confessor's guilt or innocence. Even if the confession proves to have been coerced, how can a jury ignore what it says? In *Jackson* v. *Denno*, the court ruled that the judge must determine a confession's voluntariness before the jury may hear it (TIME, Jan. 22).

Speaking for the California court in the Martinez-Aranda case, Chief Justice Roger Traynor took his cue from *Jackson* and reversed Aranda's conviction on the ground that a jury cannot "segregate evidence into separate intellectual boxes." In short, said Traynor, if A confesses that he committed criminal acts with B, the jury cannot "effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." From now on, ruled Traynor, California courts must handle codefendant confessions according to new procedures:

Confessions are permissible in joint trials if all incriminating references to other defendants are "effectively deleted" from the confession in question. In Aranda's case, it would have sufficed merely to delete his name from Martinez's confession because the confession contained no other clue to his identity.

When one defendant's confession so completely involves another defendant that "effective" deletion is impossible, the judge may grant a defense motion for separate trials.